1989

The City of West Jordan, et al. v. The Utah State Retirement Office, et al. : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE CITY OF WEST JORDAN et al,

Plaintiffs-Appellants

vs

THE UTAH STATE RETIREMENT OFFICE et al,

Defendants-Respondents

Case No. 20078

PETITION FOR REHEARING

APPEAL FROM SUMMARY JUDGMENT ENTERED
BY THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY

The Honorable David B. Dee, District Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE CITY OF WEST JORDAN et al Plaintiffs-Appellants vs THE UTAH STATE RETIREMENT OFFICE Defendants-Repondents	PETITION FOR REHEARING No. 20078

Pursuant to the provisions of Rule 35 of the Rules of the Utah Supreme Court, the Plaintiffs-Appellants hereby petition the Court for rehearing of its decision filed on December 30, 1988.

This Petition for Rehearing is based upon the following issues:

1. The Court's decision overlooked or misapprehended the Appellant's citation of Utah case law decision "authority" concerning the issue of classification of municipalities.

2. The Court's decision overlooked or misapprehended the Appellant's argument concerning the unconstitutional delegation of powers, in violation of the so-called Ripper Clause.

3. The Court's decision fails to address significant federal (and state) constitutional issues, primarily highlighted by the decision of the United States Supreme Court in the case of **First English Lutheran Evangelical Church of**

Glendale vs County of Los Angeles, _____ U.S. ____ (1987), decided by the United States Supreme Court after the briefs in this case were filed.

ARGUMENT

I

Concerning the "classification of municipalities" issue, the Court wrote:

> The classification-on-the-basis-of-population requirement of article XI, section 5 only applies to laws that classify municipalities for the purpose of defining their powers and functions and directs that if such laws make distinctions between the powers of various municipalities, those distinctions must be on the basis of population only. Our review of the state constitution and relevant precedent has revealed no authority that contradicts this interpretation of article XI, section 5, and **West Jordan has cited none.**

Emphasis added.

In their original brief, Appellants quoted at length from this Court's decision in the case of **Wadsworth vs Santaquin City,** 83 Utah 321, 28 P.2d 161 (1933). The discussion of the implications of **Wadsworth** are discussed at length on page 26 of the Appellant's original brief and needs not to be herein recited. Indeed, the language cited by Appellants from **Wadsworth** is exactly on point with the Court's statement of principle, quoted above.

However, the Court's decision is internally inconsistent: the Court concludes that Senate Bill 327 does not offend the "classification" limitation of the Utah

Constitution. But when one carefully considers what Senate Bill 327 does, it does not fit within the standard of the Court's own test, quoted above.

For example, Senate Bill 327---by mandating participation in the state retirement system for some municipalities and allowing others to not participate---has, in essence, specified the "powers" and "functions" of municipalities. Some cities, like West Jordan, are obligated to participate in the state retirement system; other cities, such as Ephraim, are not. West Jordan is obligated to forever participate in the state retirement system, regardless of the decision of its local elected officials to the contrary. It must retain that participation and make the statutory contributions corresponding thereto.

Thus, under the terms of Senate Bill 327, West Jordan City has one set of "powers" and "functions", whereas Ephraim City has another set of "powers" and "functions".

In a similar vein, West Jordan is obligated to contribute to the "police" retirement fund <u>at a different rate</u> than is Bountiful, similarly a "third-class" city of approximately the same population. West Jordan has one "function" (i.e. to contribute to the "police" retirement system at the rate of 7.59% of peace officer payroll) and Bountiful has a different "function" (to contribute at a rate of 5.59%). [Section 49-4-301, Utah Code] WHY SHOULD WEST JORDAN BE OBLIGATED TO PAY AT A HIGHER RATE THAN A SISTER MUNICIPALITY? Because of actuarial studies? That's not the

"population" criteria clearly established in **Wadsworth** and re-affirmed by the Court in the analysis (but certainly not the result) in the instant case!

The criterion upon which those cities in the one category have the "powers" and "functions" and upon which cities in the other category have different "powers" and "functions" is not based upon "population", as the Constitution requires.

If the Court's conclusion that the Legislature's determination as to a classification of municipalities may be upon any basis as is "reasonable and is related to the legislation's purpose" [as the Court's opinion in Footnote 3 implies], then the constitutional standard of "population" becomes meaningless. It is highly suspect that the Framers carefully inserted a standard they intended the Court to ignore!

The Court's opinion correctly notes that:

> West Jordan's attack is facial, i.e., it merely says that the distinctions exist and therefore they must be invalid. By failing to support its argument with any reasoning or authority, West Jordan would have us shift the burden of justifying these distinctions to the Board.

98 Utah Advance Reports at 41. West Jordan's pleaded, briefed and cited authority on this issue IS THE UTAH CONSTITUTION ITSELF. That document says "population". And this Court in **Wadsworth**, supra, correctly noted that the "only basis" for classifying municipalities was "population". There can be no greater "authority" than the basic organic document. The City

did not mean to imply that the Retirement Board had any "burden of justifying" the classification scheme not based on "population", as there can be no justification for violating the clear provisions of the Constitution!

Senate Bill 327, when carefully analyzed, violates the Court's own standard. The Court should re-examine Senate Bill 327 against the standards the Court has re-established.

II

The Court's decision states:

> We reject, as a general matter, the search for any hard and fast categorization of specific functions as "municipal" or "state." Instead, in determining whether a function is municipal, we think it appropriate to take a balancing approach, one which considers a number of factors that are pertinent to the specific legislation at issue. These include, but are not limited to, the relative abilities of the state and municipal governments to perform the function, the degree to which the performance of the function affects the interests of those beyond the boundaries of the municipality, and the extent to which the legislation under attack **will intrude upon the ability of the people within the municipality to control through their elected officials the substantive policies that affect them uniquely.** This last factor should serve to ensure due deference to a paramount purpose of the ripper clause, as it has been interpreted in Utah: "to prevent interference with local self-government."

98 Utah Advance Reports at 40. Emphasis added.

When Senate Bill 327 is examined against these criteria, it must clearly fail.

The Court misperceived the facts. The State has no "legitimate interest in determining the minimum level of retirement benefits provided by public employees by its political subdivisions." At least, the State (through the

Legislature) has not so stated. THERE IS NO ALL-ENCOMPASSING LEGISLATION WHICH MANDATES THAT ALL EMPLOYEES OF ALL POLITICAL SUBDIVISIONS MUST BE COVERED IN A RETIREMENT SYSTEM. The State isn't concerned that the employees have some coverage in a retirement system; that decision is left up to the local officials. But if the local government decides to offer any retirement program, albeit so small, the State supposedly has a "legitimate" interest and mandates contributions, at rates which may be greatly in excess of the local governments' abilities to pay!

The fact[1] (and analogy to) that the State mandates certain minimum requirements, understandably applicable to municipalities, concerning worker's compensation, unemployment benefits coverage, and occupational safety are inapplicable to the instant statutory scheme of selective coverage. Would the "worker's comp", "unemployment", or "OSHA" statutes be upheld, if they provided for coverage of only a designated percentage of the workers, and allowed the employer to exclude up to "ten percent" of his employees from the operations of those statutes? The Court must keep in mind that there are absolutely no specified criteria for those "exclusions".

Whether the employees of a given municipality are covered by retirement benefits affects no one beyond the boundaries of that municipality. Senate Bill 327 violates the Court's own articulated standard.

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1 Noted in Footnote 3 to the Court's opinion.

It is, however, the last "factor" which is most offended by Senate Bill 327: it "intrudes upon the ability of the people within the municipality to control through their elected officials the substantive policies which affect them uniquely." Senate Bill 327 mandates forever participation in the state retirement system. Thus, not only is the general concept (of participation) now beyond the "control" of the people "through their (locally) elected officials", but that participation may entail financial contribution rates greatly in excess of that communities ability or desires to pay.[2]

The Court further states:

> The legislation at issue leaves local units of government with complete autonomy in deciding whether to offer any retirement benefits.

98 Utah Advance Reports at 41. That is simply untrue. West Jordan---under the terms of Senate Bill 327---has no such "complete autonomy"! Under the terms of Senate Bill 327, it MUST participate in the state retirement system, FOREVER! Even if such is contrary to will of those taxpayers, as expressed through their locally-elected officials.

It is this type of violation that the Ripper Clause was designed to prevent. When Senate Bill 327 is understood and is carefully scrutinized under the Court's own test, it must clearly fail!

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[2] This particular issue is further aggravated by the provisions of the Utah Constitution which are designed to prevent this type of abuse and abrogation of local control of local monies, as discussed previously in Points III through VI of Appellant's original brief.

In this regard the Court's instant decision ignores the clear meaning of the terms (a factual dispute?) contained in the City's 1969 application for membership (i.e. that West Jordan's participation in the state system is to be "under such terms and conditions as are **hereafter mutually approved by** the Utah State Retirement Board, or its successor, **and the governing body of the CITY OF WEST JORDAN**") and interprets "silence" (on the issue of "withdrawal") within the statute to be evidence of perpetual membership. Instead, the exact opposite should be the case. Indeed, the presence of such language in the applications for the "police" and "firefighter" systems---as such forms were similarly prepared by the Board, and not by the City[3]---shows the relative ease with which the Board---had it intended perpetual participation be clear. It didn't. And the Court's instant decision ignores the decision in the recent case of **Johnson et al vs Utah State Retirement Board**, 91 Utah Advance Reports 8 (Utah Supreme Court, 19 September 1988), in which this Court held that a legislative enactment "to clarify" the intent of previous legislation was inoperative against pensioners who had acted in reliance to the earlier statute. The instant decision makes no atempt to reconcile **Johnson** with the instant situation wherein the City and the other plaintiffs acted in reliance upon existing statutes, which the Board now claims Senate Bill 327 merely "clarified".

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[3] It used to be a principle of Utah jurisprudence that ambiguity within a contractual document was to be construed against the preparer of that document: the Retirement Board!

III

The Court's decision overlooked the claim of the "unconstitutional taking of property without just compensation". This issue was carefully pleaded in the original complaint, in violation of both the state and national constitutions.

While this Court may have authority to rule on the interpretation of the Utah Constitution, this Court is bound by the decisions of the United States Supreme Court concerning the United States Constitution.

Subsequent to the filing of the briefs in this case, the United States Supreme Court decided the case of **First Lutheran Evangelical Church of Glendale vs Los Angeles County**, ____ US _____, 107 S Ct 2378 (June 9, 1987), in which it held that a governmental regulation (in that case, a zoning ordinance) which denies the owner of the property all use of that property is compensable under the Fifth and Fourteenth Amendments to the United States Constitutions, even if the "taking" is "temporary". That case has application to the instant situation.

Senate Bill 327 mandates that the municipal employee (at least, the designated named Appellants, herein) be a member of the state retirement system. The employee has no choice: he must be a member of the state system and must make involuntary contributions from his pay, in a percentage stipulated by the statute, to the system. The system then is able to use the employee's money.

When a member of the "police" retirement system terminates his employment prior to retirement and "withdraws" his "accumulated contributions" therefrom, as the employee is allowed to do, that employee receives no interest earnings on those contributions![4]

Those monies are being utilized, ostensibly for a "public" use. Any statute which mandates such involuntary participation in a scheme where his "property" is taken and used, without the payment of "just compensation" as is required by the national constitution, is thus unconstitutional! This issue was pleaded in the original complaint and briefed, yet the Court's decision overlooks it.

If a "temporary taking" of property (in a "zoning" context) is "unconstitutional" and thus compensable (ala **First English**), then a "temporary taking" of money (as contributions from the employee's own earnings, in the retirement context) is likewise unconstitutional! The Court is bound to honor the United States Constitution as the "supreme law of the land".

If there is a "genuine dispute as to material facts" on this issue (and on other similar issues), the Court should remand for a trial. [The trial court's premature granting of the Retirement Board's motion for summary judgment prevented the full development of a factual record on this and other

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[4] The Retirement Board's reason for denying interest accruals to those monies is that "the statute doesn't provide for it."

similar issues.] In any event, the Court should reconcile its instant decision with the controlling and applicable decisions of the United States Supreme Court.

I certify that the foregoing Petition for Rehearing is submitted in good faith and not for the purposes of delay.

Respectfully submitted this 13th day of January, 1989.

STEPHEN G HOMER
Attorney for Plaintiffs-Appellants

CERTIFICATE

I certify that I caused four copies of the foregoing PETITION FOR REHEARING to be served upon Mark A Madsen, Attorney for Defendants-Respondents, 540 East 200 South, Salt Lake City, Utah 84102, this 13th day of January, 1989.